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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92032341
Party	Defendant MICHEL FARAH ,
Correspondence Address	David M. Rogero David M. Rogero, P.A. 2600 Douglas Road, Suite 600 Coral Gables, FL 33134 UNITED STATES dmrogero@dmrpa.com
Submission	Motion for Reconsideration of Order Denying Motion for Extension of Testimony Period
Filer's Name	David M. Rogero
Filer's e-mail	dmrogero@dmrpa.com
Signature	/s/David M. Rogero/
Date	04/07/2005
Attachments	Motion reconsideration 040705.pdf (8 pages)

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PRAMIL S.R.L. (ESAPHARMA),)	Cancellation No. 32,341
)	Registration No. 2,447,970
Petitioner,)	Mark: OMIC PLUS
)	
v.)	
)	
MICHEL FARAH,)	
)	
Registrant.)	
<hr style="width: 40%; margin-left: 0;"/>)	

REGISTRANT’S MOTION FOR RECONSIDERATION OF ORDER DENYING
MOTION FOR EXTENSION OF TESTIMONY PERIOD

Registrant, Michel Farah respectfully moves pursuant to 37 C.F.R. §2.116 and Rule 60(b), Federal Rules of Civil Procedure, for reconsideration of the Board’s order denying its motion for extension of his testimony period. In the order dated March 28, 2005, the Board granted Registrant’s first two motions for enlargement of his testimony period, but denied the third, treating it as a motion to reopen, for failure to show excusable neglect. In consideration of the nominal impact on the progress of this proceeding resulting from any neglect on the Registrant’s part, the substantial prejudice to Registrant’s rights should support a finding that the neglect is excusable.

In his registration of the mark OMIC PLUS, Registrant alleged his first use in commerce in November 1990. The Petitioner seeks to cancel the registration on the ground that it began using the mark OMIC prior to May 30, 2000, the date Registrant’s application was filed. The testimony filed by the Petitioner indicates that it first used the mark OMIC in 1994. It is the Petitioner’s position that the Registrant cannot rely upon its alleged first use date without

offering evidence within its testimony period to support that claim. Thus, unless Registrant's testimony is permitted, Petitioner argues that it should prevail on its petition to cancel Registrant's mark.

At the time of the filing of Registrant's third motion for enlargement of his testimony period, the Board had not ruled on the first two motions for enlargement. Despite earlier efforts, Registrant had not been able to gather the documentary evidence to support its first use claims.¹ In addition, Registrant had attempted to accommodate the request of Petitioner's counsel to coordinate the taking of Registrant's testimony with the taking of his deposition in discovery in another pending case. A fax was sent on March 1, 2005 to Petitioner's counsel asking for dates in the month of March, but Petitioner's counsel did not respond. Registrant's testimony was noticed on March 18, 2005, to be taken in Coral Gables, Florida, on March 29, 2005.²

The order entered March 28, 2005, was not received by undersigned counsel until April 4, 2005. Thus, Registrant had no notice of the denial of his last request for enlargement of his testimony period at the time his testimony was taken on March 29, 2005.³

The testimony of the Registrant establishes that the Registrant first used the subject mark in commerce, by way of shipments in 1990 from a company in the United Kingdom into the United States for distribution here. Thus, if considered on the merits, Petitioner's request for

¹ As discussed below, evidence of the first importation of Registrant's products bearing the mark OMIC PLUS had to be obtained from the records of a closed company in the United Kingdom.

² A copy of the notice is attached as an exhibit to this motion.

³ Counsel for Petitioner did not appear and did not communicate with Registrant's attorney regarding the scheduling of the taking of Registrant's testimony.

cancellation of the registration of the mark OMIC PLUS must fail, and it is only through disregard of the facts that the Petitioner can prevail.

Because Registrant's third motion for enlargement of time was filed on the next business day after the end of the second enlargement period (which, of course, was not granted until four weeks later), the Board has treated the motion as one to reopen the testimony period, and has held Registrant to an excusable neglect standard, and found that excusable neglect has not been shown. The Board cites four factors to be considered: (1) the danger of prejudice to the Petitioner, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the Registrant, and (4) whether Registrant acted in good faith. *See Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). The Board has indicated that the third factor is considered the most important. However, as the Board states in its order, these factors are to be included as part of a consideration of all relevant circumstances.

Consideration of the first two factors does not prevent a finding of excusable neglect. In making its ruling, the Board assumed that there was no prejudice to the Petitioner. This is an appropriate assumption, because if considered upon the merits, the petition was doomed from the beginning. Petitioner can only prevail in its cancellation proceeding when the full facts are disregarded. There are no judicial proceedings that will be affected by delay in this proceeding. In fact, this proceeding was initiated in August 2001, and has been the subject of numerous extensions of time and delays. The additional thirty days needed by the Registrant to preserve his evidence and testimony cannot have any significant effect. Nor can the filing of the third request within hours of the expiration of the prior requested extension have any significant effect on the proceeding.

As to the fourth factor, nothing in the record impugns the good faith of the Registrant. In fact, the Registrant acted in good faith in procuring the needed evidence and scheduling the taking of his testimony before the Board had ruled on any of his requests for enlargements of time. What the Board did not know at the time it entered its ruling was that the Registrant had noticed the taking of his testimony, and had proceeded with the taking of his sworn testimony without notice of the Board's ruling two days before.

The Board determined that the reasons cited as a basis for the Registrant's third request for enlargement of his testimony period "are not well taken and do not rise to the excusable neglect standard." Perhaps Registrant's explanation was too "terse," as the order states, as it did not provide details. As stated above, in order for the Registrant to produce documentary evidence of his first use of his mark, over 14 years ago, documents had to be obtained from the records of a closed company in the U.K. Registrant admits that during the pendency of this proceeding, a lengthy amount of time has been afforded to procure such information, but the delay in the presentation of his testimony has made little difference in the progress of this proceeding, and given the extreme prejudice that may result from the disregard of the Registrant's evidence, any neglect on Registrant's part should be excused in favor of a determination based upon the full facts.

A thorough consideration of the totality of the circumstances, including the substantial prejudice to the Registrant that will result if his testimony is ignored, favors the reopening of testimony to permit the submission of Registrant's testimony taken on March 29, 2005.⁴ *See*

⁴ Because Petitioner's counsel chose not to participate in the taking of Registrant's testimony, there was no cross-examination. In fairness to the Petitioner, if reconsideration of the Board's order results in Registrant's testimony being considered, Registrant is prepared to afford Petitioner with an opportunity to conduct such cross-examination.

Kohl's Dep't Stores, Inc. v. Levco-Route 46 Assocs., L.P., 121 Fed. Appx. 971 (3d Cir. 2005); *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.)*, 235 F.3d 176, 182 (3d Cir. 2000). To do so, and to allow consideration of the merits upon a full factual record, will advance the interests of the administration of justice in this proceeding. To refuse Registrant's evidence, however, may permit a determination contrary to the facts, and merely engender further proceedings.

Accordingly, Registrant requests that the Board reconsider its order denying his motion for enlargement of his testimony period, and reopen the testimony period to permit the submission of Registrant's testimony and evidence.

Respectfully submitted,

/s/David M. Rogero/
David M. Rogero
Fla. Bar No. 212172
David M. Rogero, P.A.
2600 Douglas Road, Suite 600
Coral Gables, FL 33134
Telephone: (305) 441-0200
Fax: (305) 460-4099

Attorney for Registrant Michel Farah

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration was sent by first class mail with proper postage affixed, the 7th day of April, 2005, to the following counsel for petitioner:

Donald L. Dennison
Dennison, Schultz, Dougherty
1727 King Street, Suite 105
Alexandria, VA 22314

/s/David M. Rogero/

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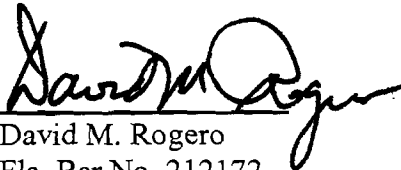
REGISTRANT'S NOTICE OF TAKING TESTIMONY DEPOSITION

Please take notice that the attorney for the Registrant, Michel Farah, will take the trial testimony deposition of Michel Farah pursuant to 37 C.F.R. §2.123 and Rule 30 of the Federal Rules of Civil Procedure.

The deposition will commence at 10:00 a.m. on Tuesday, March 29, 2005 and will continue from day to day until complete. The deposition will be taken at the offices of David M. Rogero, P.A., 2600 Douglas Road, Suite 600, Coral Gables, Florida 33134 before a qualified notary or other officer.

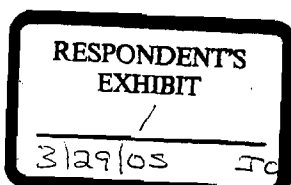
You are invited to attend and cross-examine the witness.

March 18, 2005.



David M. Rogero
Fla. Bar No. 212172

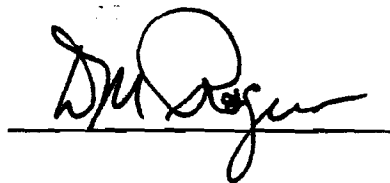
David M. Rogero, P.A.
2600 Douglas Road, Suite 600
Coral Gables, FL 33134
Telephone: (305) 441-0200
Fax: (305) 460-4099



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice was sent by fax and first class mail with proper postage affixed, the 18th day of March, 2005, to the following counsel for petitioner:

Donald L. Dennison
Dennison, Schultz, Dougherty
1727 King Street, Suite 105
Alexandria, VA 22314

A handwritten signature in black ink, appearing to read "DL Dennison", is written over a horizontal line.